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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JABAR ALEYES SMITH, Defendant and Appellant.	B157452 (Super. Ct. No. NA045342)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur Jean, Jr., Judge. Affirmed with directions.

Koryn & Koryn, Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan, Supervising Deputy Attorney General, and Allison H. Chung, Deputy Attorney General, for Plaintiff and Respondent.

Jabar Aleyes Smith appeals from the judgment entered following his convictions by jury of two counts of first degree residential robbery (Pen. Code, § 211) in concert (Pen. Code, § 213, subd. (a)(1)(A)); first degree residential burglary (Pen. Code, § 459); two counts of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)); attempted forcible sodomy (Pen. Code, §§ 664, 286, subd. (c)(2)); and sexual battery by restraint (Pen. Code, § 243.4, subd. (a)) with, as to each offense, firearm use (Pen. Code, §§ 12022.5, subd. (a), 12022.53, subd. (b)), and with court findings that he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)) and a prior serious felony conviction (Pen. Code, § 667, subd. (a)). He was sentenced to prison for 44 years 4 months.

In this case, we hold the trial court properly instructed the jury on reasonable doubt using CALJIC No. 2.90. We hold the trial court properly instructed the jury on accomplice liability using CALJIC No. 3.02. Finally, we hold that the abstract of judgment must be amended to delete any reference to the imposition of Penal Code section 1202.4, subdivision (b), or Penal Code section 1202.45, restitution fines, since the record reflects that the court never actually imposed either fine.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that on June 20, 2000, Ruben Barahona (hereafter, Ruben), Elva Barahona (hereafter, Elva), and their infant daughter Jocelyn lived in a Long Beach apartment. At about 8:00 p.m. on that date, Ruben spoke with appellant and a second man at

Ruben's front door. The second man forced Ruben inside at gunpoint and appellant, wielding a gun, also entered.

Elva, already inside, dialed 911, but appellant pointed a gun at her head, took the phone, and threw it, disconnecting the telephone line. Appellant then threw Elva, who was holding Jocelyn, to the floor, and demanded money. The second man forced Ruben to lie face down on the living room sofa, pointed a gun at his neck, and bent one of Ruben's fingers back. The second man told Ruben that the second man and appellant were going to kill Ruben, and the second man demanded money. Appellant forced Elva into a bedroom at gunpoint and, once inside, Elva obtained money which she gave to appellant. Appellant then threw Elva to the floor.

A person later knocked on the apartment door, Ruben was ordered to ask who it was, and, when Ruben complied, the person stated "'It's me.'" Ruben was told to open the door, and he complied. A third man entered holding a gun and a bag. The third gunman gave the bag to the second man, then made Ruben lie face down on the sofa. The third gunman demanded money and threatened to detonate a grenade in Ruben's mouth. The third gunman, who was on top of Ruben, then pulled down Ruben's pants and attempted to sodomize him while demanding money and guns.

Appellant, in the bedroom with Elva, searched the bedroom, then threw her face down on the bed. Appellant lowered Jocelyn's underwear and touched her buttocks. Appellant then lowered Elva's shorts and underwear. Appellant, demanding money, touched Elva's buttocks and vagina with his hand, then took off his pants. Elva told appellant there was money in a hall closet, and appellant took her there at gunpoint.

En route, Elva observed the third gunman stealing items while the second man held Ruben down.

Elva obtained money from the closet and gave it to appellant. Elva and Jocelyn later went to the living room and, while there, Ruben saw that Elva's shorts were off and appellant was trying to do something to her body. Police then arrived and appellant and his confederates fled out a window. Appellant, who had suffered a 1998 residential burglary conviction, presented an alibi defense in the present case.

CONTENTIONS

Appellant contends: (1) "[t]he trial court erred when it gave the Freeman version of CALJIC No. 2.90 because 'abiding conviction,' standing alone, does not properly explain to the jury the meaning of the prosecution's 'beyond a reasonable doubt' burden of proof"; and (2) "[t]he court erred when it instructed that the sodomy count (count 7) was the natural and probable result of the crimes of residential robbery (counts 1-2), residential burglary (count 3), and assault with a semiautomatic firearm (counts 4-5)"; and (3) "[t]he abstract of judgment incorrectly indicates that the court imposed a $200 restitution fine and a $200 parole revocation fine; the abstract must be corrected."

DISCUSSION

1. *The Giving Of CALJIC No. 2.90 Was Not Reversible Error.*

Appellant contends the reasonable doubt jury instruction given by the court violated appellant's federal constitutional rights. We reject the contention. The court

gave CALJIC No. 2.90 to the jury[1] but, appellant's arguments notwithstanding, that instruction correctly stated the law, and the court did not err in violation of the federal Constitution by giving it. (*People v. Freeman* (1994) 8 Cal.4th 450, 501-504, fn. 9, 505; *People* v. *Light* (1996) 44 Cal.App.4th 879, 884-889; *People* v. *Torres* (1996) 43 Cal.App.4th 1073, 1077-1078.)

2. *The Court Properly Instructed The Jury Using CALJIC No. 3.02.*

In the present case, the court, using CALJIC No. 3.02 (2000 re-revision), instructed the jury on the liability of principals for natural and probable consequences.[2]

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[1] That instruction read: "[a] defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] guilt is satisfactorily shown, [he] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

[2] That instruction read: "One who aids and abets another in the commission of a crime or crimes is not only guilty of those crimes, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted. [¶] In order to find the defendant guilty of the crime of sodomy as charged in Count 6, you must be satisfied beyond a reasonable doubt that: [¶] 1. The crime or crimes of robbery, assault with a semi-automatic firearm and/or residential burglary were committed; [¶] 2. That the defendant aided and abetted those crimes; [¶] 3. That a co-principal in that crime committed the crime of sodomy; and [¶] 4. The crime of sodomy was a natural and probable consequence of the commission of the crimes of robbery, burglary and/or assault with a firearm. [¶] You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified and defined crime and that the crime of sodomy was a natural and probable consequence of the commission of that crime. [¶] Whether a consequence is 'natural and probable' is an objective test based not on what the defendant actually intended

During jury argument, the prosecutor urged that the attempted sodomy of Ruben by the third gunman was a reasonably foreseeable consequence of the target crimes as to which appellant was an accomplice and, therefore, he was liable for the attempted sodomy. Appellant claims the giving of the instruction and the prosecutor's argument were erroneous. We disagree.

The test for determining whether instructions on a particular theory of guilt are appropriate is whether there is substantial evidence which would support conviction on that theory. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 528.) Penal Code, section 31, states that "[a]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or not being present, have advised and encouraged its commission, . . . are principals in any crime so committed."

An accomplice to a crime, that is, an aider and abettor, is a person who, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

"Under California law, a person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime), but

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but on what a person of reasonable and ordinary prudence would have expected would be likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural consequence' is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen."

also for any other offense (nontarget crime) committed by the confederate as a 'natural and probable consequence' of the crime originally aided and abetted. To convict a defendant of a nontarget crime as an accomplice under the 'natural and probable consequences' doctrine, the jury must find that, with knowledge of the perpetrator's unlawful purpose, and with the intent of committing, encouraging, or facilitating the commission of the target crime, the defendant aided, promoted, encouraged, or instigated the commission of the target crime. The jury must also find that the defendant's confederate committed an offense other than the target crime, and that the nontarget offense perpetrated by the confederate was a 'natural and probable consequence' of the target crime that the defendant assisted or encouraged." (*People v. Prettyman*, supra, 14 Cal.4th at p. 254.)

Prettyman later observed, "In *People v. Croy* [1985] 41 Cal.3d 1, we set forth the principles of the 'natural and probable consequences' doctrine as applied to aiders and abettors: '[An aider and abettor] is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. . . . [¶] It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific

intent that is an element of the target offense, which . . . must be found by the jury.' [Citation.] Thus, under *Croy*, a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 261.)

As the court noted in *People v. Nguyen*, *supra*, "For a criminal act to be a 'reasonably foreseeable' or a 'natural and probable' consequence of another criminal design it is not necessary that the collateral act be specifically planned or agreed upon, nor even that it be substantially certain to result from the commission of the planned act. . . . [¶] The determination whether a particular criminal act was a natural and probable consequence of another criminal act aided and abetted by a defendant requires application of an objective rather than subjective test. [Citations.] This does not mean that the issue is to be considered in the abstract as a question of law. [Citation.] Rather, the issue is a factual question to be resolved by the jury in light of all of the circumstances surrounding the incident. [Citations.] Consequently, the issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant. [Citations.]" (*People v. Nguyen*, *supra*, 21 Cal.App.4th at pp. 530-531.)

People v. Nguyen, *supra*, later observed, "Robbery is a crime that can be committed in widely varying circumstances. It can be committed in a public place,

such as on a street or in a market, or it can be committed in a place of isolation, such as in the victim's home. It can be committed in an instant, such as in a forcible purse snatching, or it can be committed over a prolonged period of time in which the victim is held hostage. *During hostage-type robberies in isolated locations, sexual abuse of victims is all too common*. As Presiding Justice Gardner observed (with respect to residential robbery) in his concurring opinion in *People v. Lopez* (1981) 116 Cal.App.3d 882, 891 . . . : 'When robbers enter the home, the scene is all too often set for other and more dreadful crimes such as that committed on Mrs. H. in this case. In the home, the victims are particularly weak and vulnerable and the robber is correspondingly secure. The result is all too often the infliction of other crimes on the helpless victim. Rapes consummated during the robbery of a bank or supermarket appear to be a rarity, but *rapes in the course of a residential robbery occur with depressing frequenc*y.

"With respect to residential robbery and other isolated victim and hostage-type robberies, we agree with Presiding Justice Gardner's observation, both as a reflection of the reported decisional authorities [citations], and as a synopsis of our experience with criminal cases which this court is regularly required to consider. Robbery victims are sexually assaulted far too often for this court to conclude, as a matter of law, that sexual offenses cannot be a reasonably foreseeable consequence of a robbery." (*People v. Nguyen*, *supra*, 21 Cal.App.4th at pp. 532-533, italics added.)[3]

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[3] In *People v. Nguyen*, *supra*, the defendants entered and robbed a tanning salon, then committed sexual offenses inside. The court in *Nguyen* stated, ". . . turning to the

In the present case, there is no dispute that appellant was an accomplice to the target crimes of residential robbery, residential burglary, and assault with a firearm committed by the third gunman. Appellant claims only that the giving of CALJIC No. 3.02 was error because the attempted sodomy committed by the third gunman was not a reasonably foreseeable consequence of said target crimes, and that the prosecutor erred by arguing that it was. We have set forth the pertinent facts concerning both the target crimes as to which appellant was an accomplice and the

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facts of this case we find ample evidence to support a theory that the sexual offenses were a reasonably foreseeable result of the defendants' participation in the group criminal endeavor. The defendants and their cohorts chose to commit robberies in businesses with a sexual aura, both from the types of services they held themselves out as providing and from the strong suspicion, repeatedly expressed by the participants at the trial, that they were actually engaged in prostitution. The businesses were arranged much like a residence, with separate rooms furnished as bedrooms might be. The businesses operated behind locked doors, which both added to their sexual aura and gave the robbers security against intrusion or discovery by outsiders. The robbers went to the businesses in sufficient numbers to easily overcome any potential resistance and to maintain control over the victims for as long as they desired. [¶] When the robbers entered the tanning salon they took control of the premises and took hostage the proprietor and her employee. They maintained their control over the premises and the victims for a significant period of time. At least some of the robbers sexually assaulted the proprietor with a pistol as a means of adding to her fear and forcing her to give up her valuables. While the proprietor was sexually assaulted all of the robbers continued to carry out their criminal endeavor. Assuming the defendants were not actual perpetrators of the sexual offense, their continuing participation in the criminal endeavor aided the perpetrators by providing the control and security they needed to tarry long enough to commit the sexual offense, by helping to convince the victim that resistance would be useless, and by dissuading the victim's employee from any notion she may have formed of going to the victim's assistance. While the defendants participated in the criminal endeavor the foreseeability of sexual assault went from possible or likely to certain, yet defendants continued to lend their aid and assistance to the endeavor. Under these circumstances it will not do for defendants to assert that they were concerned only with robbery and bear no responsibility for the sexual assault. [Citations.]" (*People v. Nguyen*, *supra*, 21 Cal.App.4th at p. 533.)

attempted sodomy. We reject appellant's claim. (Cf. *People v. Nguyen*, *supra*, 21 Cal.App.4th at pp. 527-535.)

3. *The References To Restitution Fines Must Be Stricken From The Abstract Of Judgment*.

Sentencing was on February 14, 2002. The reporter's transcript of that proceeding does not reflect that the court orally imposed a $200 restitution fine pursuant to Penal Code section 1202.4, subdivision (b), or a $200 restitution fine pursuant to Penal Code section 1202.45. Nor does that transcript reflect that the People objected to the court's failure to impose those fines. The minute order for that date, and the abstract of judgment, reflect that the court imposed each such fine.

We conclude the reporter's transcript prevails over the minute order and that the trial court failed to impose the above fines. (Cf. *People v. Martinez* (2002) 95 Cal.App.4th 581, 586-587.) That failure is not correctable on appeal. (*People v. Tillman* (2000) 22 Cal.4th 300, 301-303.)[4] We will direct the trial court to amend the abstract of judgment accordingly.

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[4] This is not a case in which the trial court imposed a Penal Code section 1202.4, subdivision (b), restitution fine, but not a Penal Code section 1202.45 restitution fine, a situation in which we would impose the latter fine. (See *People v. Smith* (2001) 24 Cal.4th 849.)

DISPOSITION

The judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment which omits any reference to the imposition of a Penal Code section 1202.4, subdivision (b), restitution fine, or to the imposition of a Penal Code section 1202.45, restitution fine.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P.J.

We concur:

KITCHING, J.

ALDRICH, J.